LEGISLATION

LEGISLATIVE ENCROACHMENT ON THE JUDICIAL POWER—The judicial power, in this country, is always based on a constitutional provision. Since the legislative power has the same basis, and the judiciary decide cases according to the substantive law enacted by the legislature, it is obvious that the legislature has some power in respect to the judiciary. But since both powers are creatures of the same organic law in which the powers are separated, it also follows that there are powers resident in a court which cannot be disturbed by legislative action. This hazy line of demarcation constitutes the boundary beyond which lies legislative encroachment on the judiciary.

The courts vary widely with the constitutions to which they owe their existence; but as the state constitutions, having been patterned after the Federal Constitution, conform in the use of the doctrine of separation of powers, and other legal incidents, so their judicial establishments conform to a sufficient standard to permit of classification. They may be classified for convenience in handling as follows:

I. *Constitutional Courts.* These include all courts specifically provided for by the constitution itself, or by legislative act under a specific power granted by the constitution. These may be subdivided into:

(a) Courts specifically named by the constitution, and given an express jurisdiction (and occasionally express powers).

(b) Courts specifically named by the constitution, the jurisdiction and powers of which are to be provided by legislative action.

(c) Courts established by the legislature under a general power to establish "inferior courts".

II. *Legislative Courts.* These include all courts created by the legislature under some type of "enabling clause", in order more efficiently to discharge some specific power given by the constitution; and also all courts created by the legislature as a function of absolute sovereignty.

Courts of class I (a), usually the courts of last resort of their respective jurisdictions, are quite common in the state systems. Their part in this discussion is very brief. If the constitution does not fix the number of judges in such a court, it can be changed at will by the legislature.[1] But such a court cannot be abolished,[2] nor can its jurisdiction be altered;[3] and it endures in its prescribed form, as does the legislature, so long as does the constitution, on which both depend for their *élan vital.*

A real problem presents itself, however, in regard to courts of classes I (b), I (c), and II. To varying extents these courts are creatures of the legislative will. To what extent can the legislature validly alter its will with respect to courts of these classes already in existence? Can they be abolished? If so, must they be replaced? Can they be deprived of jurisdiction? If so, must that jurisdiction be vested in other courts?

The majority of the courts of this country fall within the three last named classes. The federal judicial system has but one court of class I (a), the remainder of its courts falling into classes I (c), and II. In the state systems,

[1] This has been done to the United States Supreme Court frequently. The Judiciary Act of 1789, 1 STAT. 73 (1789) provided for six justices, 2 STAT. 89 (1801) reduced the number to four. It was immediately restored to six by 2 STAT. 132 (1802); raised to seven by 2 STAT. 420 (1807) § 5; raised to nine by 5 STAT. 176 (1837); raised to ten by 12 STAT. 794 (1863); reduced to seven by 14 STAT. 209 (1866); raised once more to nine, at which number it has since remained, by 16 STAT. 44 (1869), 28 U. S. C. § 326 (1926); 36 STAT. 1152 (1911), 28 U. S. C. A. § 321 (1928).

[2] Hildreth's Heirs v. M'Intire's Devisee, 1 J. J. Mar. 206 (Ky. 1829).

[3] Marbury v. Madison, 1 Cranch 49 (U. S. 1803).

courts of classes I (a) and I (b) are much more common; the extreme instances being found in Louisiana [4] and Maryland,[5] where all of the courts, down to and including the justice's courts are of class I (a). But even in the state systems courts of classes I (a) and I (b) are in the minority. Thirty-nine [6] of the state constitutions provide for the establishment of courts of class I (c). All states, of course, can establish courts of class II.

Beyond the questions of existence and jurisdiction is the question of how far the legislature can go before it encroaches on the very existence and exercise of the power confided in the judicial department of government. This limitation on legislative power exists only in the implications of "judicial power" and "court" normally the only definitive words used in vesting the power.[7] "Judicial Power", we are told, means the common law power of deciding and enforcing the decision over disputed matters.[8] "Court", as defined by Lord Chief Justice Coke, means [9]

". . . a place where justice is judicially administered."

James Wilson, in his law lectures at the University of Pennsylvania in 1790,[10] is clearer in his definition:

> "A court is a tribunal established by law, with the power to hear controversies between persons, and administer relief or punishment in accordance with established rules of law."

Both of these definitions, however, assume the legal tribunal. What is the nature of this tribunal? Are there rights and powers appertaining to its very existence? If there are, the use of the word "court" in the constitutions would, in these rights and powers, set a boundary beyond which the legislature could not go, for any alteration of the rights and powers in such a case would alter the body so that it would no longer satisfy the definitive word.

The first elements of a court which seem certain are its existence, and its jurisdiction. The judicial power of the federal government is vested by the Constitution [11] in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish". The legislative and executive powers are self-executory since elections are provided for; but it should be noted that the judicial power must be set in motion by the other departments of government. This difference is expressed in Justice Iredell's dissenting opinion in *Chisholm v. Georgia*.[12] The justice mentions that on this point, which was not mentioned by the other members of the court, he is taking issue with Randolph,

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[4] LA. CONST. (1913) art. 84 to art. 156.

[5] MD. CONST. (1867) art. IV, pts. 1, 2, 3, 4, 5, 6.

[6] ALA. CONST. (1901) art. VI, § 139; ARIZ. CONST. (1912) art. VI; CAL. CONST. (1879) art. VI; COLO. CONST. (1876) art. VI; CONN. CONST. (1828) art. V; DEL. CONST. (1897) art. IV; GA. CONST. (1877) art. VI, § 1; IDAHO CONST. (1889) art. V, § 3; ILL. CONST. (1870) art. VI; IND. CONST. (1851) art. VII, § 1; IOWA CONST. (1857) art. V, § 1; KAN. CONST. (1859) art. III, § 1; ME. CONST. (1819) art. VI, § 1; MASS. CONST. (1780) pt. II, c. III; MICH. CONST. (1908) art. VII, § 1 (two-thirds vote required); MINN. CONST. (1857) art. VI, § 1 (two-thirds vote required); MONT. CONST. (1889) art. VIII, § 1; NEB. CONST. (1875) art. V, § 1; NEV. CONST. (1864) art. VI, § 1; N. H. CONST. (1912) pt. II, art. 4; N. J. CONST. (1844) art. VI, § 1; N. M. CONST. (1912) art. VI, § 1; N. Y. CONST. (1894) art. VI, §§ 1, 2; N. C. CONST. (1868) art. IV, § 2; N. D. CONST. (1889) art. IV, § 85; OHIO CONST. (1912) art. IV, § 1 (municipal courts only); OKLA. CONST. (1907) art. VII, § 1; ORE. CONST. (1857) art. VII, § 1; PA. CONST. (1874) art. V, § 1; R. I. CONST. (1842) art. X, § 1; S. D. CONST. (1889) art. V, § 1; TENN. CONST. (1870) art. VI, § 1; TEX. CONST. (1876) art. V, § 1; UTAH CONST. (1895) art. VIII, § 1; VT. CONST. (1913) § 29 (equity courts only); WASH. CONST. (1889) art. IV, § 1; W. VA. CONST. (1872) art. VIII, § 1; WIS. CONST. (1848) art. VII, § 2; WYO. CONST. (1889) art. V, § 1.

[7] U. S. CONST. (1787) Art. III, Sec. 1; and the state constitutions cited *supra* note 6.

[8] See Huddart & Co. v. Moorehead, 8 Com. L. R. 330, 335 ff., 381 ff. (Australia, 1909).

[9] 1 CO. INST. *58.

[10] 2 WILSON'S WORKS (Andrew's ed. 1896) 75.

[11] *Supra* note 7.

[12] 2 Dall. 419, 432 (U. S. 1793).

who was of counsel, the very man who proposed the judicial provision in the Constitutional Convention of 1787.[13] Justice Iredell's concept is that federal courts must receive not only their organization as to the number of judges, but all of their authority from the legislature.

In the federal system of courts, the only court of class I (a) is the Supreme Court. It seems to be assumed that this court could not be abolished by Congressional action. There is not even a *dictum* on the point. There are no courts of class I (b), the remainder being of class I (c) and class II. The courts of class I (c) can be abolished by the Congress. This was done to the old circuit courts established by the act of 1789.[14] Justice Story in his opinion in *Martin v. Hunter's Lessee*[15] says that in such a case Congress must establish new courts so that all of the judicial power shall at all times be vested. Courts of class II exist subject to the will of the legislature which created them. The legislative body may even require such a court to give advisory opinions.[16]

Since the judicial power must be set in motion by Congress, and all but one of our federal courts may be abolished by Congress, the obvious question would seem to be: Must Congress establish courts? Justice Story met this question in his opinion in *Martin v. Hunter's Lessee*,[17] and restated his concept in his treatise many years later.[18] Reasoning from the appearance of the words "shall be vested" in the sections governing each of the three powers, he concludes that these words are mandatory, and therefore the whole judicial power must at all times be vested in some courts by Congress.[19]

The case of *Marbury v. Madison*[20] established the principle that the original jurisdiction of the Supreme Court cannot be altered by Congress. There is no apparent bar to vesting a concurrent original jurisdiction in the inferior courts by Congressional act, however.[21]

In the Constitutional Convention of 1787 a provision[22] was proposed expressly authorizing Congress to confer jurisdiction as it saw fit on the inferior courts. It was stricken out, in a subsequent session, by unanimous vote.[23] Today the situation coincides with the rejected proposal. The authority of Congress in creating courts and conferring on them all, or little, or much of the judicial power is unlimited.[24] The jurisdiction of the inferior courts is subject to and based upon Congressional statutes.[25] However, there is one inexplicably anomalous principle: the determination of the nature and extent of the admiralty and maritime jurisdiction is for the court.[26] No explanation for the distinction is made by the courts. Presumably it is because of the international nature of the subject matter. In a modern case, *Den ex dem. Murray v. The Hoboken Improvement*

[13] JOURNAL OF THE FEDERAL CONVENTION OF 1787 (1879) 69.
[14] 36 STAT. 1167 (1911).
[15] 1 Wheat. 304, 329-331 (U. S. 1816).
[16] Fidelity National Bank v. Swope, 274 U. S. 123, 134, 47 Sup. Ct. 511, 514 (1926); Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 289, 48 Sup. Ct. 507, 509 (1927).
[17] *Supra* note 15.
[18] STORY, CONSTITUTION (5th ed. 1891) §§ 1609, 1692, 1696. In concluding that all of the judicial power must be vested at all times, Story is obviously making too broad a statement, since under the Judiciary Act of 1789, which governed the operation of the Court of which he was a member, that portion of the judicial power which included claims under $500 was not vested.
[19] *Supra* note 15.
[20] *Supra* note 3.
[21] Osborn v. United States Bank, 9 Wheat. 738, 819, 821 (U. S. 1824); United States v. Ravara, 2 Dall. 297 (U. S. C. C. 1793).
[22] JOURNAL, *op. cit. supra* note 13, at 226.
[23] *Id.* at 300.
[24] United States v. Union Pac. R. R. Co., 98 U. S. 569, 602 ff. (1878); Railroad Co. v. Mississippi, 102 U. S. 135, 140 (1880).
[25] McNally v. Jackson, 7 F. (2d) 373 (E. D. La. 1925); Heine v. New York Life Ins. Co., 50 F. (2d) 382 (C. C. A. 9th, 1931).
[26] The Lottawanna, 21 Wall. 558 (U. S. 1874).

Co.,[27] there is an interesting bit of *dictum* to the effect that Congress cannot withdraw the subject matter of a suit at common law, equity or admiralty from the jurisdiction of the federal courts; nor place within it subject matter not falling within those classifications. The language is obviously far too broad. It is a long recognized principle that Congress can withdraw from the jurisdiction of the court matter then pending before it which was of proper judicial cognizance when the action was instituted.[28] The Constitutional jurisdictional limitations mark the extreme boundaries beyond which Congress may not pass in vesting jurisdiction.[29] Courts of class II are subject to Congressional will in its untrammeled exercise of a right of sovereignty in the assignment of jurisdiction.[30]

The state decisions on the existence and jurisdiction of state courts follow very closely the expressions in the federal cases. The cases are far more common in the state courts, however, since the legislatures seem fond of experiment.

In courts of class I (a), the court itself cannot be abolished.[31] The same is true of courts of class I (b), which are extremely common in the state systems. The cases uniformly hold that such courts cannot be abolished nor rendered impotent by the legislature.[32] Courts of class I (c) may be abolished at will just as in the federal system.[33]

Are these provisions (where the constitution as in Louisiana or Pennsylvania provides for an entire scheme of courts) exclusive, so that judicial power may not be vested other than in these courts? The question arises most frequently under a statute creating a morals court, juvenile court, or municipal court. Some cases have held such provisions to be exclusive;[34] but generally the authority to establish additional courts of class II is admitted,[35] either under an enabling clause or under the general power of sovereignty.

The jurisdiction which is subject to being vested in these state courts, it is well to remember, is not the constitutionally limited jurisdiction found in the federal judicial power, but the plenary, vigorous judicial power of the sovereign.[36]

The jurisdiction of courts of class I (a) cannot be affected by legislation.[37] The jurisdiction of courts of class I (b),[38] class I (c) [39] and class II [40] can be altered by the legislature as it sees fit.

It is evident, therefore, that to varying extents all courts are creatures of legislative will, and to such extent subject to variations in that will. Their existence and jurisdiction are provided for in the various ways we have discussed by the constitution itself. The line of demarcation, then, in this phase of the problem, is clear. In so far as the constitution provides, the courts are protected as to existence and jurisdiction. There are no implications in this phase and there is no legislative encroachment until the legislature contravenes an express constitutional provision.

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[27] 18 Howard *272*, *274* (U. S. 1855).

[28] Kline v. Burke Construction Co., 260 U. S. 226, 43 Sup. Ct. 79 (1922).

[29] Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282 (1926); Federal Radio Commission v. General Electric Co., 281 U. S. 464, 50 Sup. Ct. 389 (1929).

[30] American Ins. Co. v. Canter, 1 Pet. 511, 546 U. S. (1828); *Ex parte* Bakelite Corp., 279 U. S. 438, 449, 49 Sup. Ct. 411, 412 (1928).

[31] Hildreth's Heirs v. M'Intire's Devisee, *supra* note 2; Clements v. Roberts, 144 Tenn. 152, 231 S. W. 902 (1920); Klein v. Valerius, 87 Wis. 54. 57 N. W. 1112 (1894).

[32] *Ex parte* Richmond, 111 Tex. Cr. 446, 14 S. W. (2d) 851 (1929).

[33] State v. Gunter, 170 Ala. 165, 54 So. 283 (1911).

[34] Gibson v. Emerson, 7 Ark. 172 (1846); State v. Maynard, 14 Ill. 419 (1853).

[35] *Ex parte* Bollman, 4 Cranch 75 (U. S. 1807). Burke v. St. Paul, Minn., *etc.*, Ry., 35 Minn. 172, 28 N. W. 190 (1886); State v. New Brunswick, 42 N. J. L. 51 (1880); Gerlach v. Moore, 243 Pa. 603, 90 Atl. 399 (1914).

[36] ROSE, FEDERAL JURISDICTION AND PROCEDURE (4th ed. 1931), 7-10.

[37] *Supra* note 31.

[38] *Supra* note 32.

[39] *Supra* note 33.

[40] Larkin v. Simmons, 155 Ala. 273, 46 So. 451 (1908); People *ex rel.* Swift v. Luce, 204 N. Y. 478, 97 N. E. 850 (1912).

Are there other powers, however, which are implied in the judiciary, so that legislation interfering with such powers would be unconstitutional as a legislative encroachment in violation of the doctrine of separation of powers? The existence of such powers is recognized uniformly by both state [41] and federal courts.[42] They are labeled variously as general, plenary, implied or inherent powers; and are conceived of as springing into full being with the inception of the court itself and enduring so long as the court does. These powers not having been given by the legislature, are not subject to its control, even in the extreme case of courts of class II.

The most fundamental of these powers is the contempt power. This has been treated so ably elsewhere [43] that no attempt will be made to deal with it here.

The making of rules of court would seem to be a fundamental power of the court to control its own procedure. Only two courts [44] subscribe to that view; and one [45] of those limits its support to rules of the supreme court. The supreme court of that state is a court of class I (a)[46] and since the decision is based on that constitutional ground it has no bearing in a discussion of inherent power. The usual statement of the rule by state[47] and federal[48] courts is that the court has the power to make rules of court so long as they do not conflict with statutory or organic law.[49] The power is the same over courts of equity as over courts of law;[50] and extends to the very writs by which appeals are taken.[51] But when rules of court have been adopted by the court in conformity with the above principle, the court can suspend the operation of the rules to do justice in a particular case.[52] Where the legislature enacts rules of court it is not clear that such rules are *ipso facto* valid and binding on the court. If the legislative rule affects the exercise of judicial discretion, it is invalid as an encroachment in contravention of the separation of powers. This occurs most frequently where a statute limits the time for trial and for consideration of an appeal,[53] or, as in one case, where a statute makes the granting of a *certiorari* automatic if the court has not announced a decision on the petition within a limited time.[54]

The power to decide the case on the facts and law as existing at the time seems to be of the essence of the judicial process. It has been held, however, that the legislature can withdraw jurisdiction (in the classes of courts where it can

[41] Brydonjack v. State Bar of California, 208 Cal. 439, 281 Pac. 1018 (1929); Mulligan v. Mulligan, 31 Ohio C. C. 89 (1910).

[42] *Ex parte* Bollaman, *supra* note 35; Anderson v. Dunn, 6 Wheat. 204 (U. S. 1821); Strohbar v. Dwinnill, 29 F. (2d) 915 (C. C. A. 5th, 1929).

[43] Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Court—A Study in Separation of Powers* (1924) 37 HARV. L. REV. 1010; Note (1930) 2 ROCKY MT. L. REV. 115; Legis. (1932) 81 U. OF PA. L. REV. 68.

[44] Sydney v. Auburndale Constr. Co., 96 Fla. 688, 119 So. 128 (1928); State v. Ward, 184 N. C. 618, 113 S. E. 775 (1922).

[45] State v. Ward, *supra* note 44.

[46] N. C. CONST. (1876) art. IV, §§ 2, 3, 4.

[47] Upshaw v. State, 11 Ala. App. 310, 66 So. 821 (1914); Traffic Sales Co. v. Justice's Ct., 192 Cal. 377, 220 Pac. 306 (1923); Drennen v. Johnson, 65 Colo. 381, 176 Pac. 479 (1918); Keen v. State, 89 Fla. 113, 103 So. 399 (1925); Mynor v. Hammar Bros., 173 Ill. App. 507 (1912); Knickerbocker Ice Co. v. Surprise, 53 Ind. App. 286, 97 N. E. 357 (1912); Caldwell v. Cockrell, 280 Mo. 269, 217 S. W. 524 (1919); Crocker-Wheeler Co. v. Genesee Recreation Co., 101 Misc. 440, 167 N. Y. Supp. 141 (1917); Equipment Co. v. Primos Vanadium Co., 285 Pa. 432, 132 Atl. 360 (1926); Kemble v. Wiltison, 92 W. Va. 32, 114 S. E. 369 (1922).

[48] Wayman v. Southard, 10 Wheat. 1 (U. S. 1825); United States Bank v. Halstead, 10 Wheat. 51 (U. S. 1825).

[49] Keen v. State, *supra* note 47.

[50] Rifle Potato Growers' Co-op. Soc. v. Smith, 78 Colo. 171, 240 Pac. 937 (1925).

[51] Wayman v. Southard, *supra* note 48.

[52] Strohbar v. Dwinnell, *supra* note 42.

[53] Atchison, T. & S. Ry. Co. v. Long, 122 Okla. 86, 251 Pac. 495 (1926); Waterbury v. Nassor, 130 Misc. 200, 224 N. Y. Supp. 179 (1927).

[54] Holliman v. State, 165 S. E. 11 (Ga. 1932).

be done at all) from a court even pending the appeal of a case within the jurisdiction affected, which was properly within the subject jurisdiction when the action was commenced.[55] That decision stands as a landmark in this field of law today. It seems unfortunate that the case should have arisen under the circumstances in which it did, so that the decision was actually forced on the court by political expediency in the face of the situation following the Civil War, because the decision is entirely out of line with the general trend of legal decisions in this field. Several courts have held that the legislature may, by a curative act, validate a bond issue,[56] or an illegal contract,[57] pending the appeal of an action based on the obligation. In each of these cases, however, the legislature was merely correcting an error of omission of its own by supplying the legislative authority, for want of which the obligation was a *nudum pactum*. In the preceding case, however, the legislature is not perfecting rights imperfect because of its own act, but destroying rights fully and properly acquired. There is a strong distinction. Otherwise the authorities are uniform. If the question is a judicial one arising under the substantive law, its decision is reserved for the judiciary.[58] In reaching that decision the legislature has some control over the law of evidence, but other than that it can assume no power. As to the respective functions of court and jury, they remain as they were at common law, and a statute which attempts to vest the normal function of the court on the jury is invalid as a violation of the implied power to determine the law in making the decision.[59] Some legislatures have attempted to prescribe the weight to be given the finding of facts. These statutes have been held invalid, in the same way.[60] Similarly the legislature cannot take from a court of equity its power to determine the issues of both fact and law.[61] There have also been statutes providing that the court may not direct a verdict after a jury has been drawn. They have failed on the same ground.[62] After judgment has been rendered in a particular case, some legislatures have attempted to vacate,[63] or overrule [64] the judgment, or to grant a new trial.[65] In each of these cases the statute has been held invalid as a contravention of some inherent power of the court essential to the exercise of a proper judicial discretion.

Marbury v. Madison [66] is the milestone in constitutional law which establishes the doctrine of judicial review. The state courts have enthusiastically adopted this position [67] (and in fact, in a few of them,[68] the doctrine antedates *Marbury v. Madison*). By judicial review, of course, the judiciary performs an action, which, by some, is regarded as an encroachment on the legislative branch; and the legislative branch has, at times, tried to prevent this. Uniformly the courts hold such statutes void as attacks upon an inherent power of the judiciary.[69]

[55] *Ex parte* McCardle, 7 Wall. 506 (U. S. 1868).
[56] Camp v. State, 71 Fla. 381, 72 So. 483 (1916); Worley v. Idleman, 285 Ill. 214, 120 N E. 472 (1918).
[57] Kennedy v. Meyer, 259 Pa. 306, 103 Atl. 44 (1918).
[58] *Ex parte* Tillman, 84 S. C. 552, 66 S. E. 1049 (1919); Pennsylvania R. Co. v. Philadelphia County, 220 Pa. 100, 68 Atl. 676 (1908) *semble*.
[59] Kiley v. Chicago, Milw. & St. P. Ry. Co., 138 Wis. 215, 119 N. W. 309 (1909).
[60] Brown v. Buck, 75 Mich. 274, 42 N. W. 827 (1889).
[61] Hackett v. Cash, 196 Ala. 403, 72 So. 52 (1916); State v. Aetna Ins. Co., 84 Fla. 123, 92 So. 871 (1922).
[62] Thoe v. Chicago, Milw. & St. P. Ry., 181 Wis. 456, 195 N. W. 407 (1923).
[63] Wilcox v. Miner, 201 Iowa 476, 205 N. W. 847 (1926).
[64] People v. Clark, 300 Ill. 583, 133 N. E. 247 (1921).
[65] Merrill v. Sherburne, 1 N. H. 199 (1818).
[66] *Supra* note 3.
[67] United States v. Salberg, 287 F. 208 (N. D. Ohio 1923); Public Service Comm. v. Sun Cab Co., 160 Md. 476, 154 Atl. 100 (1931); Gill v. Goldfield Mines Co., 43 Nev. 1, 176 Pac. 784 (1919); Baird v. Burke Co., 53 N. D. 140, 205 N. W. 17 (1925); People v. Ganly, 218 N. Y. 749, 113 N. E. 1063 (1916); Richmond v. Carneal, 129 Va. 388, 106 S. E. 403 (1921).
[68] Holmes v. Walton, 4 Am. Hist. Rev. 456 (N. J. 1780).
[69] State v. Maine Cent. R. R., 77 N. H. 425, 92 Atl. 837 (1914).

Only one case seems to be *contra* the weight of authority, and in that case the desired construction was embodied in the statute by the legislature.[70] Such a construction is no construction at all, but part of the substantive law. It does not curb the power of judicial review; and by that power the construction or any portion of the statute containing it could be declared unconstitutional by the court if it conflicted with the organic law.

The cases are substantially agreed upon the proposition that the legislature may enact rules of evidence, usually expressed as presumptions, so long as the presumptions are reasonable and not conclusive.[71] The provision that they must be reasonable is another indication of the policy to protect judicial discretion; but as to the prohibition against conclusive statutory presumptions, the rule seems to have no valid basis. A conclusive presumption is merely a device for stating the substantive law. The legislature can change the substantive law by an open, positive enactment. It seems groundless then, to refuse to permit the legislature to state a change in the substantive law by means of the language of presumption.

Historically the court has determined the punishment to be applied on a finding of guilty in a criminal case. Modern penology, since the work of Goring[72] has discredited this method of sentencing. Dissatisfaction has also been expressed by judges of lower courts who are required to impose the sentences.[73] The result has been, in some states, passage of Indeterminate Sentence Acts, and Habitual Criminal Acts. These acts take the sentencing power away from the court, in the former by vesting the sentencing power in an administrative board, and in the latter by compelling the court to impose a heavy penalty on a certain class of offenders, deemed habitual, regardless of the nature of the crime for which the present trial is being had. These acts have been held valid in practically every state in which they have been passed,[74] although there seems to be no doubt that they deprive the court of the exercise of its judicial discretion in sentencing. When judgment has once been pronounced, however, the court has an inherent power to enforce that judgment of which the legislature cannot deprive it.[75]

The power to admit to practice before the court and to disbar, is usually held to be purely a judicial function,[76] since the attorney is an officer of the court, a member of the judicial branch, and subject only to judicial control.[77] Many statutes have been passed on the subject and many and divers have been the opinions of the courts with reference to this power. Only one jurisdiction holds that the legislature can compel the admission of one who has not complied with

[70] Bettenbrock v. Miller, 185 Ind. 600, 112 N. E. 771 (1916).

[71] Hawes v. Georgia, 258 U. S. 1, 42 Sup. Ct. 204 (1922); Shamlian v. Equitable Acc. Co., 226 Mass. 67, 115 N. E. 46 (1917); Garron v. Steamboat Canal Co., 43 Nev. 298, 185 Pac. 801 (1919); Caffee v. State, 11 Okla. Cr. 485, 148 Pac. 680 (1915); Commonwealth v. Berryman, 72 Pa. Super. 479 (1919); State v. Potello, 40 Utah 56, 119 Pac. 1023 (1911).

[72] GORING, ENGLISH CONVICT, A STATISTICAL STUDY (1913).

[73] Horace Stern, Judge of the Philadelphia Court of Common Pleas, No. 2, in the *Phila. Evening Bulletin*, Dec. 14, 1932, at 14.

[74] Johnson v. State, 169 Ga. 814, 152 S. E. 76 (1929); Wilson v. Commonwealth, 141 Ky. 341, 132 S. W. 557 (1910); People v. Cook, 147 Mich. 127, 110 N. W. 514 (1907); State v. Dugan, 84 N. J. L. 603, 89 Atl. 691 (1913) *aff'd* in 85 N. J. L. 731, 90 Atl. 287 (1914); Commonwealth v. McKenty, 52 Pa. Super. 332 (1913); Mutart v. Pratt, 51 Utah 246, 170 Pac. 67 (1917).

[75] *In re* Opinion of the Justices, 208 Mass. 610, 94 N. E. 852 (1911); State v. Bank of Minatore, 242 N. W. 278 (Neb. 1932); Smith v. Washington Ins. Co., 110 N. J. Eq. 122, 159 Atl. 510 (1932); Underhill v. Schenck, 205 App. Div. 182, 199 N. Y. Supp. 611 (1923).

[76] *Ex parte* Secombe, 19 Howard 9 (U. S. 1856); *Ex parte* Garland, 4 Wall. 333 (U. S. 1866); Randall v. Brigham, 7 Wall. 523 (U. S. 1868); Hertz v. United States, 18 F. (2d) 52 (C. C. A. 8th, 1927); Brydonjack v. State Bar of California, *supra* note 41; Hanson v. Grattan, 84 Kan. 843, 115 Pac. 646 (1911); *In re* Bruen, 102 Wash. 472, 172 Pac. 1152 (1918).

[77] *In re* Cate, 94 Cal. App. 222, 270 Pac. 968 (1928).

the formal requirements.[78] Other courts have vigorously denied such a power to admit or reinstate.[79] Most of the statutes merely define the minimum requirements, and the courts admit a legislative power to set up minimum requirements.[80] These decisions are illogical, as they first postulate a statement of an implied power in the court to admit and disbar, and then acknowledge a right in the legislature to set up minimum requirements. The more logical view, as taken by one court,[81] is that the court defers to the statute merely out of comity. The statutes involved, in all except that case, simply provide minimum requirements which the court would have used as a minimum in any event. The court is under no compulsion to accept those who meet the minimum. Such acknowledgment of a statute which does not bind the court is scarcely a denial of an inherent power to admit and disbar.

In addition courts have miscellaneous inherent powers, necessary to the proper and efficient discharge of their duties. The court has the power to investigate crime; and the legislature may not interfere, nor make such investigation, unless as a basis for legislation.[82] The court has inherent power to make such orders as are necessary to the dispatch of business,[83] to correct records at any and all times so that the record will speak the truth,[84] to replace lost records,[85] to modify judgment,[86] to control the order of business,[87] to adjourn from day to day,[88] to appoint necessary assistants and order them paid,[89] to make rules governing the conduct of counsel,[90] to purchase necessary furniture,[91] to control the use of the court house and its appurtenances,[92] and to incur and order paid bills for the proper care of jurors, who, in the best interests of justice are detained over night.[93]

These decisions show an interesting trend. The older decisions, and all of those modern decisions on statutes aimed to strip the judiciary of power solely for the benefit of the legislature, jealously guard the inherent powers of the judiciary. The modern decisions which are concerned, however, with legislative experiments in the field of social legislation, such as acts establishing Juvenile Courts, or Morals Courts, or Habitual Criminal Acts, or Indeterminate Sentence Acts, are, on the other hand, most liberal in construing valid these acts which remove just as much inherent power. This course of action has given society the benefit of modern social control agencies while retaining the judicial establishment, as provided by the constitution, independent of legislative control by means of the doctrine of the separation of powers.

J. J. L.

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[78] *In re* Applicants for License, 143 N. C. 1, 55 S. E. 635 (1906).
[79] State v. Brough, 33 Ohio C. C. 257 (1912); State v. Cannon, 206 Wis. 374, 240 N. W. 441 (1932).
[80] *In re* Opinion of the Justices, *supra* note 75; *In re* Saddler, 35 Okla. 510, 130 Pac. 906 (1913); Hoopes v. Bradshaw, 231 Pa. 485, 80 Atl. 1098 (1911); *In re* Bruen, *supra* note 76.
[81] State v. Cannon, *supra* note 79.
[82] State v. Gayman, 31 Ohio C. C. 59 (1908).
[83] Carr v. Adams, 70 N. H. 622, 45 Atl. 1084 (1899).
[84] People v. Ward, 141 Cal. 628, 75 Pac. 306 (1904); Gulf Mail S. S. Co. v. Hammond S. S. Co., 67 Cal. App. 420, 227 Pac. 938 (1924); Fort Worth R. Co. v. Roberts, 98 Tex. 42, 81 S. W. 25 (1904).
[85] Robertson v. State, 45 Fla. 94, 34 So. 294 (1903).
[86] Crawford v. Chicago Ry., 171 Mo. 68, 66 S. W. 350 (1902).
[87] Clarke v. Eighth Ave. Ry., 114 Misc. 707, 188 N. Y. Supp. 14 (1920).
[88] Cribb v. State, 118 Ga. 316, 45 S. E. 396 (1903).
[89] Menella v. Metropolitan Street Ry., 43 Misc. 5, 86 N. Y. Supp. 930 (1904); *In re* Janitor of Supreme Court, 35 Wis. 410 (1874).
[90] Davis v. State, 189 Ind. 464, 128 N. E. 354 (1920).
[91] Schmelzel v. Board of Com'rs, 16 Idaho 32, 100 Pac. 106 (1909); State v. Davis, 26 Nev. 373, 68 Pac. 689 (1902).
[92] Board of Com'rs v. Stout, 136 Ind. 53, 35 N. E. 683 (1893).
[93] Bates v. Independence Co., 23 Ark. 722 (1861); Stowell v. Jackson Co., 57 Mich. 31, 23 N. W. 557 (1885); Fernekes v. Milwaukee Co., 43 Wis. 303 (1877).